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No. 367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

FEDERAL POWER COMMISSION,
Petitioner,

v.

THE STATE OF OREGON, THE FISH COMMISSION OF OREGON, THE OREGON STATE GAME COMMISSION,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION OF THE STATE OF TEXAS TO APPEAR AMICUS CURIAE AND ADOPT BRIEF OF RESPONDENTS

JOHN BEN SHEPPERD
Attorney General of Texas

Amicus Curiae

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now comes the State of Texas in its sovereign capacity by John Ben Shepperd, its Attorney General, and moves the Court for leave to appear in this cause as amicus curiae and in lieu of filing a brief of amicus curiae to adopt the briefs of the Respondents filed herein upon the condition that such appearance will not have the effect of making the State of Texas or any of its agencies parties to this litigation.

The Constitution of Texas designates rivers and streams as natural resources and invests the Texas Legislature with their care. Article XVI, Section 59a, Constitution of Texas. The ownership of the waters of natural streams is expressly declared to be in the State of Texas. Article 7467, Vernon's Texas Civil Statutes and Article 4026, Vernon's Texas Civil Statutes. The ownership of public waters is held in trust for the people. *Hoefs v. Short*, 114 Tex. 501, 273 S.W. 785 (1925); *Goldsmith and Powell v. State*, 159 S.W. 2d 534 (Tex. Civ. App. 1942, error ref.)

In *Clark v. Briscoe Irr. Co.*, 200 S.W. 2d 674, 680, 681 (Tex. Civ. App. 1947), the Court discussed the statutory provisions relating to public waters belonging to the State. The Court stated:

> "Art. 7466 declares the public policy of the state in accordance with the 1917 amendment.
>
> "Art. 7467 declares that the ordinary flow and underflow, and the storm, flood and rain waters of every river or natural stream, etc., within this State, and the right to the use thereof 'are hereby declared to be the property of the State, and the right to the use thereof may be acquired by appropriation in the manner and for the uses and purposes hereinafter provided, and may be taken or diverted from its natural channel for any of the purposes expressed in this chapter.'
>
> "Arts. 7470 and 7470a prescribe the following as the purposes for which water may be appropriated: irrigation, mining,

milling, manufacturing, development of water power, construction and operation of waterworks for cities and towns, public parks, game preserves, recreation and pleasure resorts, power and water supply for industrial purposes and plants and domestic uses.

"Art. 7471 provides: In the conservation and utilization of water declared to be the property of the State, the public welfare requires not only the recognition of uses beneficial to the public well-being, but requires as a constructive public policy, a declaration of priorities and appropriation thereof. These priorities so declared are: (1) Domestic and municipal uses; (2) uses to convert material from a lesser to a greater value; (3) irrigation; (4) mining; (5) hydro-electric power; (6) navigation; (7) recreation and pleasure.

"Art. 7472c reads: 'Conservation of water resources for public welfare.

"In the administration of laws provided for the maximum judicious employment of the State waters in the public interest, it shall be the duty of the State Board of Water Engineers, or other administrative agency designated for the service by the State, *to conserve this natural resource in the greatest practicable measure for the public welfare;* and recognizing the Statutory precedent established for granting the privilege to take and utilize the waters of the State for uses recognized and authorized, it shall be the duty of the State Board of Water Engineers or other agency of the State designated for the purpose to

observe the rule that as between applicants for rights to use the waters of the State, preference be given not only in the order of preferential uses declared, but that preference also be given those applications the *purposes for which contemplate and will effectuate the maximum utilization of waters and are designated and calculated to prevent the escape of waters without contribution to a beneficial public service.'*

". . .

"Art. 7492 requires that every person, etc., who desires to acquire the right to appropriate unappropriated waters 'shall before commencing the construction, enlargement or extension of any dam,' etc., 'in connection with the storage, taking or diversion of water, make an application in writing to the Board for a permit to make such appropriation, storage or diversion.'

". . .

"Art. 7495 reads: 'Nothing in this Act shall be held or construed to require the filing of an application or procuring of any permit for the alteration, enlargement, extension or addition to any canal, ditch, or other work that does not contemplate, or will not result in, an increased appropriation, or the use of a larger volume of water, but before making any such alteration, enlargement, extension or addition, the person, association of persons, corporation or irrigation district desiring to make same, shall file with the Board of Water Engineers a detailed statement and plan for the information of the board, of the work proposed to be done.'

"Art. 7506 makes it the duty of the Board to reject the application (if inter alia) it '*is detrimental to the public welfare.*' The wording of this article was in some respects slightly changed by amendment in 1943, Acts 48th Leg., p. 455, ch. 303, § 1. The change is, if in fact any in substance, not important here. The quoted wording was not changed.

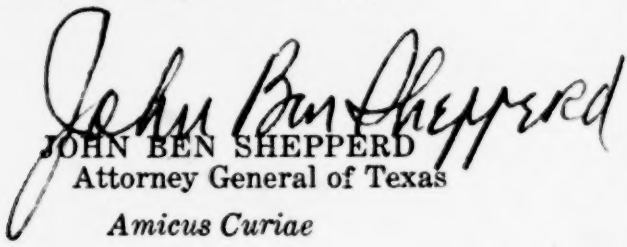
"Art. 7507 reads: 'It shall be the duty of the Board to approve all applications and issue the permit asked for if such application is made in proper form in compliance with the provisions of this chapter and the regulations of said Board; and is accompanied by the fees required in this chapter; and if the proposed appropriation contemplates the application of water to any of the uses and purposes provided for in this chapter, and does not impair existing water rights, or vested riparian rights and *is not detrimental to the public welfare.*' "

Although the Desert Land Act of 1877 is not applicable to Texas, the interest of the State of Texas stems primarily from the right of a sovereign state to exercise control over and regulate the use of the waters of its public streams. It is a well-established rule in Texas that waters of public streams belong to the State and are held in trust for the benefit of the people.

The Federal government has only such powers as are delegated by the Constitution. The power to legislate on the question of acquisition and control of water rights in this cause has never been delegated and this power is in the individual states.

This dedication of public waters to the beneficial uses of the citizens of the state confers upon the state the power of administration or regulation of the waters flowing within its boundaries and also the power to regulate the use of such waters as between the respective claimants. Pursuant to this dedication the state acts in its sovereign capacity. Therefore, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed inasmuch as a reversal would impair the long-recognized right of the state to regulate these uses.

Respectfully submitted,



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